

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CUBAN CURCURU, DAVID A. CURCURU,)	
SUSAN M. CURCURU, and D.C.,)	
a minor,)	
)	
Plaintiffs,)	
)	
v.)	No. 4:06 CV 1675 DDN
)	
TRINITY INDUSTRIES, INC.,)	
ROBERT McCABE, BRIAN REHEISSE,)	
MARK MALEDY, and)	
MILTON "ERIC" L. FREANT III,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

This matter is before the court on the motion of plaintiffs Cuban Curcuru, David A. Curcuru, Susan M. Curcuru, and D.C. to remand (Doc. 13).¹ The parties have consented to the authority of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). (Doc. 26.) A hearing was held on January 25, 2007.

I. Background

Plaintiffs Cuban Curcuru, David A. Curcuru, Susan M. Curcuru, and D.C., a minor, commenced this wrongful death action in the Circuit Court of the City of St. Louis against defendants Trinity Industries, Inc., Robert McCabe, Brian Reheisse, Mark Maledy, and Milton "Eric" L. Freant III. Defendant Trinity Industries removed the action, pursuant to 28

¹Also pending is the motion of non-party American Interstate Insurance Company to quash a notice of deposition (Doc. 16), the motion of the individual defendants to dismiss (Doc. 37, and the motion of plaintiffs to stay (Doc. 39), which the court does not reach in this opinion.

U.S.C. §§ 1441(a)², 1446,³ and 1332.⁴ All defendants consented to the removal. (Doc. 20.)

In their state court petition, plaintiffs allege that their decedent Ralph Curcuru was employed by Traffic Control Company when, on December 5, 2005, he was struck and killed, when a truck mounted attenuator,⁵ manufactured by Trinity Industries, fell on him. Plaintiffs allege in their petition that the heavy attenuator device is designed to be pulled from the horizontal to a vertical position by a winch and two winch straps secured by retention bolts. Plaintiffs allege that two retention bolts failed and the attenuator remained in the horizontal position instead of being winched to a vertical position. Plaintiffs allege that after the bolts failed, the Traffic Control Company work crew, which included decedent Curcuru and defendants McCabe, Reheisse, Maledy, and Freant, manually lifted the heavy attenuator to the vertical position. When the attenuator was in the vertical position, all of the work crew members, except decedent Curcuru, stepped away from the heavy attenuator. Plaintiffs allege that, because the heavy device was not adequately secured, it fell back to the horizontal position with tremendous force, crushing decedent Curcuru, who had remained holding it, to death.

Counts I, II, and III of the state court petition allege claims against defendant Trinity Industries for negligence, strict liability,

²This section provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants," 28 U.S.C. § 1441(a).

³This section provides that any defendant who wishes to remove a state-filed case shall file a notice of removal, and provides the procedural steps for doing so. See 28 U.S.C. § 1446.

⁴This section provides that federal district courts shall have original jurisdiction over civil actions where the amount in controversy exceeds \$75,000 and the citizenship of the parties is diverse. 28 U.S.C. § 1332.

⁵The "attenuator" is described by plaintiffs as an "heavy duty crash bumper" and appears to be a sturdy device that, at least in one position, extends backward horizontally from the rear of a heavy duty truck. See Doc. 14 at 1 and Attach. 1

and failure to warn, respectively. Count IV alleges a claim for negligent wrongful death against the individual defendants because of the manner in which the attenuator was lifted from the horizontal, because they failed to adequately secure the attenuator before stepping away from it, and because they allowed it to fall from the vertical to the horizontal.

Plaintiffs also allege in conclusory fashion in their petition that each of the alleged acts of the individual defendants

constitutes an affirmative negligent act above, beyond and outside the scope of their duty to provide a safe workplace and each of which constitutes something more than a breach of the duly (sic) general supervision and safety, and is a breach of a personally-owned (sic) duty of care and a breach of a common law duty to exercise reasonable care to co-employees.

(Doc. 1, Petition at 12.)

Defendants removed the case on the basis of diversity of citizenship subject matter jurisdiction. Plaintiffs do not gainsay that the jurisdictional amount in controversy exists. However, they argue that the presence in the case of the individual defendants, who are all Missouri citizens as are the plaintiffs, destroys the complete diversity of citizenship necessary for jurisdiction. Defendants argue that the individual defendants were fraudulently joined purposely by the plaintiffs to destroy diversity of citizenship and, for this reason, the Missouri citizenship of the individual defendants should be disregarded. The issue of whether the individual defendants were fraudulently sued is joined in the plaintiffs' motion to remand the action to the state court.

II. Discussion

Defendants can remove this state court action to this court only if it could have been brought here originally; this court must have subject matter jurisdiction over the action. 28 U.S.C. § 1441(b); Peters v. Union Pac. R.R. Co., 80 F.3d 257, 260 (8th Cir. 1996). As stated, defendants assert diversity of citizenship jurisdiction; plaintiffs argue that such jurisdiction is not present. Removal statutes are strictly construed; any doubts about this court's

jurisdiction must be resolved against removal and in favor of remand. Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997).

A defendant is fraudulently joined, when there is no reasonable basis in law or fact for a claim against the defendant whose presence destroys diversity of citizenship, thereby making removal improper; in those circumstances, the court may ignore that defendant's citizenship for purposes of determining whether jurisdiction exists. Wiles v. Capitol Indem. Corp., 280 F.3d 868, 871 (8th Cir. 2002). "However, if there is a 'colorable' cause of action--that is, if the state law *might* impose liability on the resident defendant under the facts alleged--then there is no fraudulent joinder." Filla v. Norfolk S. Ry. Co., 336 F.3d 806, 810 (8th Cir. 2003).

The boundary between fraudulent joinder and a colorable cause of action is difficult to survey. In stretching the chain, the court "must simply determine whether there is a reasonable basis for predicting that the state's law **might** impose liability against the defendant." Filla, 336 F.3d at 811 (emphasis added). The determination is made on a case-by-case basis. State ex rel. Taylor v. Wallace, 73 S.W.3d 620, 622 (Mo. banc 2002).

Very recently the Eighth Circuit, through Chief Judge James B. Loken, described the current state of Missouri law regarding the issue now before this court:

The [Missouri] Workers' Compensation Law provides the exclusive remedy against employers for injuries covered by its provisions. This immunity from suit extends to employees of the exempt employer, albeit in a more limited fashion. Suits against employees personally for breach of the duty to maintain a safe working environment are preempted by the workers' compensation remedy: "However, an employee may sue a fellow employee for affirmative negligent acts outside the scope of an employer's responsibility to provide a safe workplace." State ex rel. Taylor v. Wallace, 73 S.W.3d 620, 621-22 (Mo. banc 2002), quoting Kelley v. DeKalb Energy Co., 865 S.W.2d 670, 672 (Mo. banc 1993). In Taylor, plaintiff's claim was based on alleged negligent driving by a co-worker. The Court concluded that the co-worker was entitled to immunity from suit because the claim simply alleged breach of the employer's duty to maintain a safe work environment.

* * *

The question whether a co-worker committed the kind of "affirmative negligent act" that creates an exception to workers' compensation immunity is decided "on a case-by-case basis with close reference to the facts in each individual case." Taylor, 73 S.W.3d at 622. The Supreme Court of Missouri has addressed the issue in three cases. In 1993, the Court reversed the grant of summary judgment in favor of a supervisor, holding that evidence he personally arranged a "make-shift" hoist system that failed, causing an employee's injuries, "may constitute an affirmative negligent act outside the scope of his responsibility to provide a safe workplace.... Such acts constitute a breach of personal duty of care owed to plaintiff." Tauchert v. Boatmen's Nat'l Bank, 849 S.W.2d 573, 574 (Mo. banc 1993). However, eight months later, the Court affirmed the grant of summary judgment in favor of five co-workers who designed and constructed a "corn flamer" that exploded, severely burning a fellow employee. The Court concluded that "the condition of the corn flamer was part of the employer's nondelegable duty to provide a safe workplace," distinguishing Tauchert because there was no evidence the corn flamer was "make-shift" or "jerry-rigged." Kelley, 865 S.W.2d at 672.

In subsequent decisions applying Tauchert and Kelley, the Missouri Court of Appeals noted two considerations important in determining whether a co-worker is not entitled to workers' compensation immunity because his alleged conduct constituted the kind of affirmative negligent act that breached a personal duty of care. First, immunity is likely to attach if the co-employee's negligence occurred while he was regularly carrying out ordinary duties for the employer. See Collier v. Moore, 21 S.W.3d 858, 862 (Mo. App. 2000); Felling v. Ritter, 876 S.W.2d 2, 5 (Mo. App. 1994). On the other hand, a supervisor is not entitled to his employer's immunity if he directed the plaintiff employee "to engage in dangerous conditions that a reasonable person would recognize as hazardous beyond the usual requirements of employment." Sexton v. Jenkins & Assocs., Inc., 41 S.W.3d 1, 5 (Mo. App. 2000); see Logsdon v. Killinger, 69 S.W.3d 529, 533 (Mo. App. 2002); Hedqlin v. Stahl Specialty Co., 903 S.W.2d 922, 927 (Mo. Ct. App. 1995).^[6]

6

To maintain an action against the co-employee, the injured worker must demonstrate circumstances showing a personal duty of care owed by defendant to the injured worker, separate and apart from the employer's non-delegable duties, and that breach of this personal duty proximately caused the worker's injuries. Whether a personal duty has arisen so that the co-employee may be held liable will necessarily depend on the facts and circumstances of the case, determined as a matter of law, giving due consideration to the policy factors

The Missouri Supreme Court returned to the co-employee immunity issue in Taylor, holding that a co-worker was entitled to immunity from a suit alleging that his negligent driving of the employer's truck in the course of his regular duties injured his passenger, a fellow employee. "This is not the kind of purposeful, affirmatively dangerous conduct that Missouri courts have recognized as moving a fellow employee outside the protection of the Workers' Compensation Law's exclusive remedy provisions." 73 S.W.3d at 622.

A large majority of the Missouri Court of Appeals decisions since the decision in Taylor have held co-worker defendants immune from suit. In several cases, the defendant supervisors had instructed the plaintiffs to engage in conduct which put them at risk, but the conduct was within the usual requirements of their jobs. See Risher, 182 S.W.3d at 587-89; Nowlin ex rel. Carter v. Nichols, 163 S.W.3d 575, 578-79 (Mo. App. 2005); State ex rel. Larkin v. Oxenhandler, 159 S.W.3d 417, 423 (Mo. App. 2005); Graham v. Geisz, 149 S.W.3d 459, 462 (Mo. App. 2004). In the one case where dismissal of a co-worker was reversed on the merits, plaintiff complained that her machine was malfunctioning dangerously. Her supervisor replied, "quit whining," and instructed plaintiff to keep using the machine without correcting the malfunction or even inspecting the machine's condition, which "effectively created the dangerous condition resulting in the injuries sustained." Groh v. Kohler, 148 S.W.3d 11, 16 (Mo. App. 2004).

In this case, Simpson alleges that she was injured while performing her normal duty of operating the power press machine. The machine was not "make shift" or "jerry-rigged," nor did her injury result from a malfunction of which Thomure was aware and ignored. Rather, Thomure was allegedly negligent for setting the machine to operate in the more dangerous of its two control modes and for allowing Simpson to operate the machine in that control mode without adequate safety instruction. Like the corn flamer in Kelley, the condition of the power press machine "was part of the employer's nondelegable duty to provide a safe workplace." 865 S.W.2d at 672. Failing to install a recommended safety device relates to the employer's general duty to provide a

described above. What we hold, given the cases from this state, as well as those from other jurisdictions, is that a personal duty will arise out of circumstances where the co-employee engages in an affirmative act, outside the scope of employer's non-delegable duties, directed at a worker, increasing the foreseen to cause injury to another.

Gunnett v. Girardier Bldg. and Realty Co., 70 S.W.3d 632, 641 (Mo. Ct. App. 2002).

safe work environment. Felling, 876 S.W.2d at 3, 5. And allegations of inadequate training or inadequate safety warnings also relate to the employer's general duty. See Crow v. Kansas City Power & Light Co., 174 S.W.3d 523, 529-30 (Mo. App. 2005).

Simpson v. Thomure, 2007 WL 1308982 at ** 2-4 (8th Cir. May 7, 2007).

The court discerns from Chief Judge Loken's analysis that Missouri courts might find a legitimate cause of action in a claim against a co-employee, if the action of the defendant is alleged to be an affirmative, negligent act outside the employer's duty to provide a safe workplace, especially seen where the workplace device or mechanism involved was make-shift or jerry rigged and the defendant(s) engaged in a hazardous activity beyond the usual requirements of the subject employment. All of these factors are alleged in plaintiffs' state court petition. Albeit in conclusory fashion, plaintiffs allege expressly that defendants' acts are affirmative negligent acts outside the scope of their duty to provide a safe workplace. (Doc. 1, Petition at 12.) The specifically alleged facts involved an unintended situation on the workplace, i.e., a horizontal attenuator whose winch mechanism was unusable because of broken strap bolts and the defendants' engaging in a make-shift⁷ way of raising the device to a vertical position. The allegations indicate that the way the device was raised was very dangerous, because it was apparent that, without the rest of the workers securing it, if the device fell from the vertical, it was too heavy for one man to keep it lifted. The facts alleged indicate that allowing the attenuator to fall as it did was outside the usual way the device was used by the workers in their employment. The fatal injuries to the decedent allegedly occurred when the co-worker defendants affirmatively acted in a negligent manner, other than the usual way the device was used, by stepping away from the attenuator allowing it to fall to the horizontal.

⁷In a very recent "make-shift" repair of workplace device case, albeit involving a supervisor, the Supreme Court of Missouri affirmed the judgment against the co-worker defendant. Burns v. Smith, 214 S.W.3d 335 (Mo. banc 2007).

Based upon this record, although the matter is not without doubt, the court determines that there is a reasonable basis for predicting that Missouri law *might* impose liability on the individual defendants. Whether or not the evidence and facts, indicated by the plaintiffs' allegations, will establish a personal duty of care owed by the individual defendants, separate and apart from the employer's non-delegable duties, must await further litigation. The court at this time cannot conclude that plaintiffs' claims against the individual defendants are legally fraudulent. Such a doubt about the law of Missouri and, thus, about this court's subject matter jurisdiction, requires the court to resolve the issues in favor of remand. Under these circumstances, the court must consider the citizenship of the individual defendants. Therefore, because there is no complete diversity of the parties' citizenship, this court is without subject matter jurisdiction.

For these reasons,

IT IS HEREBY ORDERED that the motion of the plaintiffs for remand (Doc. 13) is sustained. The action is remanded to the Circuit Court of the City of St. Louis.

 /S/ David D. Noce
DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed on May 21, 2007.